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Aedy bin Osman v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–108 OF 2009(J)
ALAUDDIN PCA, ZULKEFLI AND JAMES FOONG FCJJ
4 OCTOBER 2010

C *Evidence — Trafficking dangerous drugs — Possession — Police arrested accused walking alone with large amount of cannabis in bag — Whether accused's defence that bag and his other personal belongings were left on rack of his motorcycle unattended in public place for two hours was improbable — Whether police officers who arrested accused never testified about existence of motorcycle* D *— Whether trial court right to conclude that if motorcycle existed police would have seized it at time of arrest — Whether accused unable to show that third party had put drugs into bag without his knowledge — Whether trial court right to find accused had mens rea possession of drugs — Whether accused's defence mere denial*

E The appellant raised two main grounds in his instant appeal against conviction and sentence of death — handed down by the High Court and affirmed by the Court of Appeal — for trafficking in 1,989g of cannabis. One was that he had no knowledge of the existence of the drugs; the other was that police had failed to investigate whether it was actually he, and not another person arrested hours F later at a different location with a huge cache of *ganja*, who was the real trafficker. According to the testimony of the police officers involved in the appellant's arrest, they noticed him walking alone towards a convenience store with a bag ('the bag') slung over the right shoulder and behaving suspiciously. When they approached the appellant and identified themselves, the appellant G tried to run but he was subdued. The 1,989g of cannabis was found in the bag. In his defence, the appellant contended that he had left the bag and his jacket and helmet on the rack of his motorcycle in front of the convenience store for about 1 1/2 hours while he was at an office nearby and that as he was walking back to his motorcycle a friend named Kassim pulled up alongside him in a car H and spoke to him briefly from inside the car. The appellant claimed that it was immediately after his conversation with Kassim that he was arrested. The officer ('PW4') who arrested the appellant admitted during the trial that hours after arresting the appellant, he and other officers arrested another person at a different location for having about 13kg of ganja and that that case was related I to the appellant's. PW4 said he could not remember the name of the suspect in the other arrest. The appellant argued that the police's failure to investigate whether it was that other suspect, and not him, who was the real trafficker had denied him of the chance to be acquitted. The trial court believed the prosecution witnesses and ruled that there was no motorcycle as claimed by the

appellant because if there was one, the police would have seized it as well; that Kassim was a non-existent person invented by the appellant and that it was improbable that Kassim could have placed the drugs in the bag. The trial court found that the appellant adduced no evidence to disprove the strong inference that he had knowledge and possession of the cannabis in the bag.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) There was no flaw in the trial court's conclusion that Kassim was a fictitious character invented by the appellant. There was no evidence to link Kassim, even if he had existed, to the drugs in the bag. Even according to the appellant's evidence, he only spoke with Kassim for about two minutes and Kassim never got out of his car. If Kassim had wanted to put the drugs in the bag there was no need for him to have waited to meet the appellant if the bag was lying unattended in the rack of the motorcycle for 1 1/2 hours as claimed by the appellant (see para 18).

(2) The events described by the appellant to imply that he had a motorcycle at the material time on which he had left the bag and his personal belongings unattended in a public area for 1 1/2 hours were improbable (see para 18).

(3) In the authorities relied upon by the appellant, the common thread was that the accused in each case relied upon some credible evidence to show that another person was the real culprit. In the instant case, however, the appellant had not accused anyone of planting the cannabis in the bag; not even Kassim. Nothing in the appellant's evidence implicated Kassim, nor did the appellant's cross-examination of PW4 indicate that he was framed. Except for the evidence that someone was subsequently arrested in connection with the appellant's case, there was nothing more. Unless there was a connection between the appellant's offence and that of another which might exculpate the appellant of the offence, it was unfair for the appellant to claim that the prosecution had failed to prove its case or that he had cast a reasonable doubt in the prosecution's case to warrant an acquittal. The appellant's defence was practically a mere denial of the existence of the drugs in the bag (see paras 22–23).

[Bahasa Malaysia summary

Perayu membangkitkan dua alasan utama dalam rayuannya ini terhadap sabitan dan hukuman mati — yang dijatuhkan oleh Mahkamah Tinggi dan disahkan oleh Mahkamah Rayuan — kerana mengedar dadah kanabis sebanyak 1,989g. Satu adalah bahawa dia tidak mempunyai pengetahuan mengenai kewujudan dadah tersebut; lagi satu adalah bahawa polis telah gagal untuk menyiasat sama ada ia sebenarnya dialah, dan bukan orang lain ditangkap beberapa jam kemudiannya di lokasi berlainan dengan sejumlah

besar ganja, adalah pengedar sebenar. Mengikut keterangan pegawai polis yang terlibat dalam penangkapan perayu, mereka melihat dia berjalan seorang diri ke arah kedai mudah beli dengan beg ('beg tersebut') digalas di bahu kanan dan berkelakuan curiga. Apabila mereka mendekati perayu dan memperkenalkan diri mereka, perayu mencuba untuk melarikan diri tetapi dapat ditahan. 1,989g kanabis dijumpai dalam beg. Dalam pembelaannya, perayu berhujah bahawa dia meninggalkan beg tersebut dan jaket dan topi keledarnya atas rak motosikalnya di hadapan kedai mudah beli lebih kurang 1 1/2 jam semasa dia berada di pejabat berhampiran dan bahawa semasa dia berjalan balik ke motosikalnya kawan yang bernama Kassim yang menaiki kereta berhenti di sebelahnya dan bercakap dengannya secara ringkas dari kereta. Perayu mendakwa bahawa ia adalah sebaik sahaja perbualannya dengan Kassim dia ditangkap. Pegawai ('PW4') yang menangkap perayu mengaku semasa perbicaraan bahawa beberapa jam selepas menangkap perayu, dia dan pegawai yang lain menangkap orang lain di lokasi yang berasingan kerana memiliki 13kg ganja dan bahawa kes tersebut berkaitan kepada kes perayu. PW4 menyatakan dia tidak ingat nama suspek dalam tangkapan yang lain. Perayu berhujah bahawa kegagalan polis untuk menyiasat sama ada ia adalah suspek lain, dan bukan dia, adalah pengedar sebenar telah menafikan dia peluang untuk dibebaskan. Mahkamah perbicaraan percaya saksi-saksi pihak pendakwaan dan memutuskan bahawa tidak terdapat motosikal seperti yang didakwa oleh perayu kerana jika terdapat satu, polis akan merampasnya juga; bahawa Kassim orang yang tidak wujud yang direka oleh perayu dan bahawa ia adalah tidak dapat dipercayai bahawa Kassim boleh meletakkan dadah tersebut dalam beg. Mahkamah perbicaraan mendapati bahawa perayu tidak mengemukakan keterangan untuk membuktikan inferens kuat bahawa dia mempunyai pengetahuan dan milikan terhadap kanabis dalam beg tersebut.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Tidak terdapat kecacatan dalam kesimpulan mahkamah perbicaraan bahawa Kassim adalah watak rekaan yang direka oleh perayu. Tidak terdapat keterangan untuk menghubungkan Kassim, walaupun dia wujud, kepada dadah dalam beg tersebut. Malah mengikut keterangan perayu, dia hanya bercakap dengan Kassim lebih kurang dua minit dan Kassim tidak keluar dari keretanya. Jika Kassim hendak meletakkan dadah dalam beg tersebut tidak perlu baginya untuk menunggu untuk berjumpa perayu jika beg tersebut tidak dijaga dalam rak motosikal 1 1/2 jam seperti yang didakwa perayu (lihat perenggan 18).

(2) Kejadian yang diterangkan oleh perayu untuk mengatakan bahawa dia mempunyai motosikal pada masa material di mana dia telah meninggalkan beg tersebut dan milikan peribadinya yang tidak dijaga di kawasan awam untuk selama 1 1/2 jam adalah tidak dapat dipercayai (lihat perenggan 18).

(3) Autoriti-autoriti yang digunapakai oleh perayu, ciri-ciri adalah bahawa tertuduh dalam setiap kes yang digunapakai beberapa keterangan yang boleh dipercayai untuk menunjukkan bahawa orang yang lain adalah orang yang melakukan kesalahan sebenarnya. Dalam kes ini, walau bagaimanapun, perayu tidak menuduh sesiapapun meletakkan kanabis dalam beg tersebut; juga bukan Kassim. Tidak terdapat apa-apa dalam keterangan perayu membabitkan Kassim, juga pemeriksaan balas perayu terhadap PW4 menunjukkan yang dia dianiaya. Kecuali untuk keterangan bahawa seseorang kemudiannya ditangkap berhubung dengan kes perayu, tidak terdapat apa-apa lagi. Kecuali terdapat hubungan di antara kesalahan perayu dan kesalahan seorang lagi yang mungkin membebaskan perayu daripada kesalahan tersebut, ia adalah tak adil untuk perayu mendakwa bahawa pihak pendakwaan telah gagal untuk membuktikan kesnya atau bahawa dia melepaskan keraguan munasabah dalam kes pihak pendakwaan untuk mewajarkan pembebasan. Pembelaan perayu sebenarnya penafian semata-mata terhadap kewujudan dadah dalam beg tersebut (lihat perenggan 22–23).]

Notes

For a case on possession, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3316.

Cases referred to

Chow Kok Keong v PP [1998] 2 MLJ 337, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
PP v Iskandar bin Mohamad Yusof [2006] 5 MLJ 559; [2006] 6 CLJ 379, HC (refd)
Yee Wen Chin v PP [2008] 6 MLJ 222; [2008] 6 CLJ 773, CA (refd)

Legislation referred to

Dangerous Drug Act 1952 s 39B(2)
Evidence Act 1950 s 8

Appeal from: Criminal Appeal No J-05–175 of 2008 (Court of Appeal, Putrajaya)

Gobind Singh Deo (Gobind Singh Deo & Co) for the appellant.
Ahmad bin Bachee (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

James Foong FCJ:

INTRODUCTION

[1] The appellant was convicted for trafficking in 1,989g of cannabis on 10 February 2006 and was sentenced to death under s 39B(2) of the Dangerous Drug Act 1952 ('the DDA'). His appeal to the Court of Appeal was dismissed; thus this appeal before us.

FACTS

[2] The facts of this case are relatively straight forward.

[3] According to the evidence of the arresting officer, PW4, on information received, an ambush was laid by a team of police officers led by him in the vicinity of a convenience store known as 'One Mart 24 Jam' at Jalan Padi Emas 4/1 Bandar Baru Uda, Johore Baru, Johore. At about 4.15pm he noticed a male Malay acting in a suspicious manner walking towards the said convenience store. He had a red bag slung over his right shoulder. PW4 and another police officer approached this man and declared themselves as police officers. This man attempted to escape. After a brief struggle, and with the help of other police officers who were engaged in the ambush, he was apprehended. This man was the appellant. PW4 discovered in the red bag two packages of compact dried materials suspected of cannabis and a work pass belong to the appellant. The suspected cannabis were sent to the chemistry department where they were analysed and found to be cannabis weighing 1,989g.

[4] Before us, Mr Gobind Singh Deo, counsel for the appellant, raised two principal arguments.

[5] The first concerns the absence of intention ie, mens rea in the appellant. According to Mr Gobind, the courts below have failed to give due consideration to the events and circumstances when they made a finding that the appellant had possession of the drugs and thus the necessary knowledge of it.

[6] He relied on the events disclosed by the appellant in his defence to support this contention. We shall relate what the appellant said.

[7] According to the appellant, he was working as a clerk in a sea forwarding and transport company. On the day in question, he received a call from his father, who was also a member of this company, that certain custom import documents were ready. He returned to the company's office on his motorcycle JHX 8533. He parked his motorcycle in front of the said convenience store and

left his bag, his jacket, helmet and key necessary to start the bike on the rack of his motorcycle. It was not for just a moment but from 2.30–4pm. He then came down from his office with some documents which he deposited on the rack of his bike. Just then, he met a friend known as Kassim. Kassim, a forwarding agent informed him that the boss of Pelabuhan Tanjung Pelepas was unable to meet him. Kassim then left. This engagement took only two minutes. During re-examination, the appellant explained that when he spoke to Kassim, Kassim was inside a car with the car window slightly wound down. His motorcycle was about five meters from Kassim's car. After this conversation, the appellant was arrested.

[8] Before we proceed to analyse the arguments presented by the appellant that his evidence can negate him of his knowledge of the drugs found in the bag it is appropriate to set out what the trial judge said of this.

[9] The trial judge before defence was called, after maximum evaluation of the evidence presented by the prosecution, came to this finding:

(a) the appellant was walking towards the convenience store;

(b) he was carrying a red bag and inside this bag the impugned drugs were found;

(c) the appellant had possession and control over this bag and thus has knowledge of the contents therein;

(d) since the appellant attempted to escape before he was apprehended, the appellant must have known of the contents in the bag for otherwise there is no reason for him to put up a struggle;

(e) the appellant was acting in a suspicious manner when walking towards the convenience store;

(f) based on these, the trial judge said:

> Semua keterangan di atas jika dilihat secara berasingan mungkin bersifat taksa ('equivocal') tetapi jika dinilai secara menyeluruh dan bersama, kelakuan OKT yang meronta-ronta dan cuba melarikan diri ketika ditahan oleh SP4 itu boleh dibuat inferen yang pasti bahawa OKT mempunyai milikan mens rea terhadap dadah yang menjadi hal perkara pertuduhan. Adalah juga menjadi undang-undang yang mantap bahawa kelakuan OKT sedemikian adalah boleh diterima masuk sebagai keterangan di bawah s 8 Akta Keterangan 1950 (lihat kes-kes *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19).

[10] On the evidence as presented at the stage of the prosecution case, we find no error committed by the trial judge in coming to such a decision.

Regarding intention derived from the struggle between the appellant and the police officers who apprehended him, this relates to the appellant's conduct which is admissible under s 8 of the Evidence Act 1950. This element of conduct has been discussed by this court in detail in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19. It is not necessary for us to repeat except to say that the trial judge has correctly exercised his discretion in coming to a conclusion that in the circumstances of this case, the struggle between the appellant and the police officers, though in plain clothes, is a factor, amongst others, to imply that the appellant has knowledge of what was inside the bag. We agree that there may be another inference to this: such as the appellant being scared when pounced upon by certain men unknown to him but then, as the trial judge has said, other factors like the appellant walking in a suspicious manner and carrying a bag over his shoulder which contained the incriminating drugs considered as a whole implies that the appellant has knowledge of what was inside the bag.

[11] Now as regards to the evidence adduced subsequent to the prosecution case, we are of the view that this is very much tied up with the second issue raised by Mr Gobind. This is the alleged existence of Kassim. Combine this with another piece of evidence which we shall disclose shortly, the appellant intends to convince us that he has raised a reasonable defence.

[12] When PW4 was under cross-examination, he revealed as follows:

> Ada tangkapan lain di Kulai pada hari yang sama, iaitu pada malam hari itu. Saya terlibat dalam tangkapan itu. Ya, ia berkaitan dengan kes yang sama. Barang kes ada dijumpai dalam kes di Kulai itu. Ya, lebih kurung 13 kilogram ganja. Ada tangkapan di buat, nama tidak ingat. Saya ada nyatakan dalam salinan laporan.

[13] According to Mr Gobind, since SP4 was involved in both raids (one on the appellant and the other in a case related to this) he had the opportunity to determine if the person arrested in Kulai was the real trafficker instead of the appellant. The police should have conducted a thorough investigation to find out whether there was link between the arrest of the appellant and the one in Kulai. He cited the case of *Public Prosecutor v Iskandar bin Mohamad Yusof* [2006] 5 MLJ 559; [2006] 6 CLJ 379 in support. Since the trial judge and the court below did not view the whole evidence objectively and from all angles, the appellant has lost his chance of an acquittal. He cited *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 in support.

[14] Before we proceed to analyse this, we shall set out the grounds of judgment of the High Court relating to Kassim.

[15] Affirmatively, the trial judge rejected the existence of Kassim with these words:

'Kassim' bukanlah seorang yang sebenar dan 'Kassim' ialah rekaan OKT bagi melepaskan diri daripada pertuduhan yang dikemukakan terhadapnya. A

[16] The reasons he proffered were:

(a) all prosecution witnesses had testified that the appellant was walking alone. There was no motorcycle which the appellant claimed was parked in front of the convenience store where the appellant declared that he stood beside it when he spoke to Kassim. If there was a motorcycle, the police would have seized it and listed it in the search list; B

(b) PW4 is believed to be telling the truth judging by his demeanour. When PW4 disclosed another arrest connected with this case, it was during cross-examination. He revealed what he knew and had no evil motive to conceal anything relating to this other case; C

(c) the implication that Kassim could be the one who placed the incriminating drugs into the red bag is not probable. The alleged conversation between Kassim and the appellant only took two minutes. In fact this conversation may not have taken place since Kassim could have conveniently passed this message to the appellant through the telephone; D E

(d) if Kassim had placed the drugs in the red bag there is no necessity to wait for the appellant to come down from his office since the bag was left unattended on the appellant's alleged motorcycle; and

(e) the appellant's father (DW2) who testified that he saw Kassim in the car cannot be true. He said this to assist the appellant's version of the defence. F

[17] There are two aspects to this argument of the appellant. First, whether it is probable that Kassim had put the drugs into the red bag? Second, was Kassim or another person the real drug trafficker? G

[18] According to the finding of the trial judge, there was no Kassim. He was a fictitious character invented by the appellant. We find no flaw in this conclusion. The prosecution has all along insisted that the appellant was alone when arrested and, he was walking towards the convenience store; there was no motorcycle. The events described by the appellant to imply that he had a motorcycle at the material time are just improbable: leaving his bag which contained business documents, his jacket, his helmet as well as the key to his bike on the rack of the bike parked in a public area for 1 1/2 hours unattended. And then you have Kassim who could, as the trial judge said, deliver the message through the phone rather than the need to be physically present. Even accepting the appellant's version that Kassim was there engaging the appellant, it was only for two minutes and Kassim never got out of the car. According to H I

A the appellant's own evidence, Kassim only spoke to him through a partially wound down window. There is just no evidence to link Kassim, even though if he had existed, to the placement of the drugs by him into the red bag. And as observantly pointed out by the trial judge, if Kassim had done this, there is no necessity for him to wait for the appellant to come down from his office. The B red bag was venerably exposed on the bike for him to do what he pleases. So out of these, there can only be one inference drawn: that Kassim did not exist and it is improbable that he placed the drugs in the red bag.

C **[19]** We accept that there is the evidence of the appellant's father who testified that he saw Kassim in the car at the material time. But against the overwhelming evidence which has proven otherwise the trial judge was right in not believing him. In addition, we would like to add that the evidence of this witness may be tailored to match the appellant since he was present in court D when the appellant testified.

[20] Now we turn to the second aspect: was Kassim or another person who was arrested on the same day in Kulai by PW4 the real drug trafficker? According the Mr Gobind, it is incumbent upon the police to call evidence to E rebut the challenge that another person was the real trafficker. Failure of the trial judge to consider this amounts to a misdirection.

[21] It is not in dispute that PW2 had carried out a raid in Kulai on the same day and was related to this case. PW2 however testified that he could not F remember the name of the person arrested and disagreed that that person was the real trafficker. That case, according to him was investigated by another investigating officer.

[22] From the authorities cited by the appellant's counsel, it is incumbent G upon the prosecution to call evidence to rebut any claim which is relevant and material by the defence in the course of cross-examination of the prosecution witnesses than risking dismissal of its case for want of proof. In *Public Prosecutor v Iskandar bin Mohamad Yusof* [2006] 5 MLJ 559; [2006] 6 CLJ 379, *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337, *Yee Wen Chin v Public* H *Prosecutor* [2008] 6 MLJ 222; [2008] 6 CLJ 773, it was held that if there is evidence adduced to demonstrate that someone else rather than the accused was the real trafficker, then the trial judge should give due consideration to this before arriving at a decision to convict the accused. But the common thread among these authorities is that the accused had relied on some creditable I evidence that another person was the real culprit. In *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, the accused was walking along the main road with one other person who was identified as Hashim. Hashim escaped while the accused threw the bag he was carrying which was later found to contain the incriminating drugs. The accused claimed that he was an

innocent carrier and Hashim was the real culprit. Since there was sufficient evidence to prove the existence of Hashim, the accused had his conviction for trafficking set aside and replaced with one for possession. In *Chow Kok Keong v Public Prosecutor*, again there was evidence to indicate the existence of another person who handed the bag to the accused that led the Federal Court to substitute a conviction of trafficking to that of possession. The same sort of facts appears in both *Yee Wen Chin v Public Prosecutor* and *Public Prosecutor v Iskandar bin Mohamad Yusof*.

[23] In this instant case however, the appellant's defence was practically one of mere denial of the existence of the drugs found in his bag. This is reflected in his own testimony. He has not accused any person for planting the drugs there; not even Kassim. In fact, his conversation with Kassim was brief and there is nothing in his evidence to implicate Kassim as the person who inserted the drugs inside his bag. His counsel's cross-examination of PW4 does not indicate that he was framed. Indeed, there was someone who was subsequently arrested in connection with this case but except for this, there is no link between the offence which the appellant was charged with that. Unless there is a connection between the appellant's offence with that of another which may exculpate him from what he is charged then it is unfair for him to claim that either the prosecution has failed to prove its case or that he has cast a reasonable doubt in the prosecution case to warrant an acquittal.

[24] For these reasons we are of the opinion that the appellant's appeal should be dismissed. Accordingly, we affirm the conviction and sentence passed by the courts below.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar